Tan Hock Chan v Menteri Dalam Negeri, Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44-54-92
MOKHTAR SIDIN J
20 AUGUST 1993

Constitutional Law *— Preventive detention — Habeas corpus — Earlier unlawful detention of applicant — Whether second detention was also unlawful —Whether second detention was continuation of earlier unlawful detention*

Constitutional Law *— Preventive detention — Habeas corpus — Whether detention of applicant was null and void for non-compliance with requirements of Extradition Act 1992 — Extradition Act 1992 requires that requisition be made by a country through its diplomatic services — Whether letter of requisition signed by consular officer of the British High Commission — Onus on respondent to satisfy court that he was a consular officer — Diplomatic and Consular Privileges Ordinance 1957 s 2(1)*

Words and Phrases *— 'Country' — Extradition Act 1992 s 38*

Words and Phrases *— 'Consular officer' — Diplomatic and Consular Privileges Ordinance 1957 s 2(1)*

A requisition was made by the Hong Kong government under the Extradition Ordinance 1958 ('the Ordinance') for the extradition of the applicant to Hong Kong. The applicant was arrested, detained and produced before the magistrates' court where he was released on bail. An extradition enquiry was fixed for hearing but did not take place and a later date was fixed. However, on that date, the second respondent requested the matter to be adjourned as they needed time to study which of the two extradition laws would be applicable in view that the Extradition Act 1992 ('the Act') had come into force on 20 February 1992. An application for the release of the applicant's passport was to be heard, but in view of the strong objection by the second respondent, the court adjourned the hearing of the application. Due to affluxion of time, the applicant abandoned the application for the release of his passport.

When the matter came before the court, counsel for the second respondent informed the court that as the Act applied he prayed for the applicant's discharge with a view of commencing fresh proceedings under the Act. The applicant was then discharged by the court but was immediately re-arrested and re-charged for the same offences under the Act. The hearing of the enquiry under the Act was tentatively fixed and at all material times, the applicant had been released on bail. It was conceded by the respondents that though the applicant had been released on bail, technically he was under detention and was entitled to bring the present application before the court.

A At the hearing of this application, counsel for the applicant raised two broad issues: (i) that the detention of the applicant under the Act was null and void because it was a continuation of another detention which was illegal (the detention under the Ordinance); and (ii) the detention of the applicant was null and void for non-compliance with the requirements of the Act which requires that the requisition must B be made by a country through its diplomatic services.

Held, granting the applicant the writ of habeas corpus:

(1) Although the colony of Hong Kong falls within the definition of a foreign country under the Ordinance, that by itself is not sufficient C for Hong Kong to make a requisition. A 'foreign country' can only invoke the Ordinance if it satisfies the requirements under s 3 of the Ordinance, namely, there must be an arrangement existing between Malaysia and that foreign country, in this case the colony of Hong Kong. In the absence of such an arrangement, there must be a special direction by the Minister. In a matter D where the liberty of a subject is affected, viz the detention of a person, the party who had initiated the detention must satisfy the court that the detention was done lawfully. In the present case, not only did the respondents fail to satisfy the court that the detention under the Ordinance was lawfully done, they did not E raise the issue whether the detention under the Ordinance was lawful or not. As such, the respondents conceded that the detention of the applicant under the Ordinance was not lawfully done.

(2) The position in Malaysia is that if a detention of a person was a result of an earlier unlawful detention, then the second detention was also unlawful. As such, the detention of the applicant under F the Act was unlawful because in effect it was a continuation of the unlawful detention.Therefore, that was sufficient for the court to allow the present application.

(3) The onus is on the respondents to prove that the requisition letter was made by a consular officer of the British High Commission. G Section 2(1) of the Act states that a person is said to be a consular officer when there is a letter of authorization from the Government of Malaysia for that officer to perform consular functions. No such authorization letter was produced and as such there was no evidence to show that the writer of the letter was a consular officer to enable him to make a request on behalf of the United Kingdom. H As such, if the letter was to be treated as a request, it was not a valid request under the Act.

[Bahasa Malaysia summary

Suatu rekuisisi telah dibuat oleh kerajaan Hong Kong di bawah I Extradition Ordinance 1958 ('Ordinan itu') untuk penyerahan-balik pemohon ke Hong Kong. Pemohon telah ditangkap, ditahan dan dibawa ke hadapan mahkamah majistret di mana beliau telah dilepaskan

atas jaminan. Suatu siasatan serah-ballik telah ditetapkan untuk pendengaran tetapi tidak diadakan dan suatu tarikh kemudian telah ditetapkan. Bagaimanapun pada tarikh itu, responden kedua telah memohon supaya perkara itu ditangguhkan kerana mereka memerlukan masa untuk mengkaji yang mana satu daripada dua undang-undang serah-balik yang terpakai memandangkan bahawa Akta Ekstradisi 1992 ('Akta itu') telah berkuatkuasa pada 20 Februari 1992. Suatu permohonan untuk pelepasan pasport pemohon telah ditetapkan untuk pendengaran tetapi memandangkan bantahan kuat yang dibuat oleh responden kedua, mahkamah telah menangguhkan pendengaran permohonan itu. Disebabkan penjalanan masa, pemohon telah menghentikan permohonan untuk pelepasan pasportnya.

Apabila perkara ini dibawa di hadapan mahkamah, peguambela responden kedua telah memberitahu mahkamah bahawa oleh kerana Akta itu terpakai, beliau memohon supaya pemohon dilepaskan dengan tujuan memulakan tindakan baru di bawah Akta itu. Pemohon kemudiannya telah dilepaskan oleh mahkamah tetapi telah ditangkap semula dengan serta-merta telah ditangkap dan dituduh untuk kesalahan yang sama di bawah Akta itu. Pendengaran siasatan di bawah Akta itu telah ditetapkan sementara waktu dan pada setiap masa material, pemohon telah dilepaskan atas jaminan. Responden mengaku bahawa walaupun pemohon telah dilepaskan atas jaminan, secara teknikal beliau masih di bawah tahanan dan berhak membawa permohonan ini ke mahkamah. Pada pendengaran permohonan ini, peguambela pemohon telah menimbulkan dua isu: (i) bahawa penahanan pemohon di bawah Akta itu adalah batal dan tidak sah kerana ia adalah suatu sambungan tahanan lain yang menyalahi undang-undang (tahanan di bawah Ordinan itu); dan (ii) penahanan pemohon adalah batal dan tidak sah kerana ketidakpatuhan dengan keperluan Akta itu, yang memerlukan supaya rekuisisi itu dibuat oleh sesebuah negara melalui perkhidmatan diplomatiknya.

Diputuskan, membenarkan pemohon writ habeas corpus:

(1) Walaupun koloni Hong Kong termasuk dalam takrif negara asing di bawah Ordinan itu, ia dengan sendirinya tidak mencukupi untuk membolehkan Hong Kong membuat suatu rekuisisi. Suatu 'negara asing' boleh menggunakan Ordinan itu hanya jika ia memenuhi keperluan di bawah s 3 Ordinan itu, iaitu, mesti terdapat suatu persetujuan di antara Malaysia dan negara asing it, di dalam kes ini koloni Hong Kong. Tanpa suatu persetujuan sedemikian, mesti terdapat suatu arahan khas oleh Menteri. Dalam sesuatu perkara di mana kebebasan seseorang rakyat terjejas, iaitu di mana seseorang telah ditahan, pihak yang menjalankan tahanan itu mesti memuaskan mahkamah bahawa tahanan itu telah dibuat secara sah. Dalam kes ini, responden bukan sahaja gagal memuaskan mahkamah bahawa tahanan di bawah Ordinan itu dibuat secara sah, mereka juga tidak menimbulkan isu sama ada tahanan di bawah Ordinan itu sah atau tidak. Oleh itu, responden

mengaku bahawa penahanan pemohon di bawah Ordinan itu tidak dibuat secara sah.

(2) Kedudukan di Malaysia adalah jika tahanan seseorang adalah akibat tahanan terlebih dahulu yang menyalahi undang-undang, suatu tahanan kedua itu juga menyalahi undang-undang. Oleh yang demikian, penahanan pemohon di bawah Akta itu menyalahi undang-undang kerana ia sebenarnya adalah suatu sambungan penahanan yang menyalahi undang-undang. Oleh itu, perkara itu adalah mencukupi untuk mahkamah membenarkan permohonan ini.

(3) Beban membukti terletak atas responden untuk membuktikan bahawa surat rekuisisi itu telah dibuat oleh seorang pegawai konsul Suruhanjaya Tinggi British. Seksyen 2(1) Akta itu menyatakan bahawa seseorang itu boleh dikatakan seorang pegawai konsul di mana terdapat suatu surat pemberikuasaan daripada kerajaan Malaysia untuk orang itu menjalankan fungsi konsul. Surat sedemikian tidak ditunjukkan dan oleh itu tidak ada keterangan untuk menunjukkan bahawa penulis surat itu adalah seorang pegawai konsul yang dibenarkan membuat permohonan bagi pihak United Kingdom. Oleh demikian, jika surat itu hendak dianggap sebagai suatu permohonan, ia bukan suatu permohonan yang sah di bawah Akta itu.]

[*Editorial Note*: The respondents have appealed to the Supreme Court vide Criminal Appeal No 05–58–93 and Civil Appeal No 01–31–93.]

Notes

For cases on preventive detention, see 3 Mallal's Digest (4th Ed) paras 597–610, 686.

Cases referred to

1 *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 (refd)
2 *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45 (folld)
3 *State (Trimbole) v The Governor of Mountjoy* 1985 IR 550 (folld)
4 *Jagannath Misa & Ors v State of Orissa* AIR 1969 Orissa 296 (not folld)
5 *Godavari v State of Maharastra* AIR 1964 SC 1128 (distd)

Legislation referred to

Commonwealth Fugitive Criminals Act 1967 ss 2
Diplomatic and Consular Privileges Ordinance 1957 s 2(1)
Extradition Act 1992 ss 1, 2(1), 3, 12
Extradition Ordinance 1958 ss 3, 3A

Mohd Shafee Abdullah (*Shafee & Co*), *Mohd Nor Mohamad* (*Wong-Chooi & Mohd Nor*) and *Mahinder Singh Dulku* (*Mahinder Singh Dulku & Co*) for the applicant.

Noorbahri Baharuddin (Senior Federal Counsel) for the first and third respondents. A

Raja Aziz Addruse (*Rithauddeen & Aziz*) and *Ajit Kumar Hastir* (*Chooi & Co*) for the second respondent.

Cur Adv Vult B

Mokhtar Sidin J: This is an application by one Tan Hock Chan @ Tan Hock Lai for a writ of habeas corpus ad subjiciendum. The applicant's detention, albeit bailed, was as a result of two requisitions for extradition for certain offences in Hong Kong. The facts surrounding this application are mostly undisputed. The relevant facts are as follows. C

On 10 June 1991, the Hong Kong Government made a requisition under the Extradition Ordinance 1958 (hereinafter referred to as 'the Ordinance') for the extradition of the applicant to Hong Kong for certain offences. On 3 July 1991, a warrant of apprehension was issued and as a result of that, the applicant was arrested on 18 July 1991 and detained at the police headquarters, Bukit Aman, Kuala Lumpur. On 19 July 1991, he D was produced before the magistrate's court where he was released on bail. On 5 August 1991, the deputy public prosecutor produced the minister's order and the extradition enquiry was fixed for hearing from 14 to 19 October 1991. The hearing did not take place, as on 18 October 1991, the deputy public prosecutor indicated that Raja Aziz Addruse will appear E for the second respondent and the enquiry was fixed for hearing from 20 July to 14 August 1992. However, on 20 July 1992, the second respondent requested the matter to be adjourned as they needed time to study which of the two extradition laws would be applicable in view of the Extradition Act 1992 (hereinafter referred to as 'the Act') which had come into force on 20 February 1992. On 24 July 1992, an application for the release of the F applicant's passport was to be heard, but in view of the strong objection by the second respondent, the court adjourned the hearing of the application to 29 July 1992. Due to affluxion of time, the applicant abandoned the application for the release of his passport. On 4 August 1992, when the matter came before the court, counsel for the second respondent informed G the court that as the Act applies he prayed for the applicant's discharge with a view of recommencing fresh proceedings under the Act. The applicant was then discharged by the court but was immediately re-arrested and re-charged for the same offences under the Act. The hearing of the enquiry under the Act was fixed tentatively from 17 August to 11 September 1992. At all material times, the applicant had been released on bail. It was H conceded by the respondents that though the applicant had been released on bail, technically, he is under detention and is entitled to bring the present application before the court.

At the hearing of this application, counsel for the applicant raised two broad issues. Firstly, that the detention of the applicant under the Act is I null and void because it is a continuation of another detention which was illegal (which was the detention under the Ordinance). Secondly, the detention of the applicant is null and void for non-compliance with the requirements of the Act.

A On the first issue, it was submitted by the applicant that on 3 July 1991, a warrant of arrest was issued by the magistrate at Kuala Lumpur at the order of the first respondent. The first respondent was acting on a request made by the second respondent for the extradition of the applicant to the colony of Hong Kong. The request by the second respondent was made B pursuant to s 8(1)(b) of the Ordinance which has now been repealed. It was contended by the applicant that the Ordinance and the Commonwealth Fugitive Criminals Act 1967 are not applicable to Hong Kong and as such the extradition proceedings under the request made under the Ordinance was bad in law.

Prior to the coming into force of the Act, a fugitive criminal could only C be extradited from Malaysia under the Ordinance or under the Commonwealth Fugitive Criminals Act 1967. It is clear to me that the Commonwealth Fugitive Criminals Act 1967 is not applicable. Section 2 of the Commonwealth Fugitive Criminals Act 1967 narrowed the application of that Act to a 'prescribed commonwealth country'. A 'prescribed D commonwealth country' is defined to be a Commonwealth country specified in the order made under s 1(2) of that Act. It appears to me that no such order has been made in respect of the colony of Hong Kong. As such the Commonwealth Fugitive Criminals Act 1967 is not applicable to the colony of Hong Kong. I believe the second respondent is of the same view and that is why it has made the requisition under the Ordinance.

E The question to be considered next is whether the Ordinance applies to a requisition from Hong Kong. As can be seen in s 2, the Ordinance applies to a 'foreign country' which includes any Commonwealth country which is not a 'prescribed commonwealth country' within the meaning of the Commonwealth Fugitive Criminals Act 1967. As such the colony of Hong F Kong falls within the definition of a foreign country under the Ordinance. That by itself is not sufficient for Hong Kong to make a requisition. A 'foreign country' can only invoke the Ordinance if it satisfies the requirements under s 3 of the Ordinance, namely, there must be an arrangement existing between Malaysia and that foreign country, in this case the colony of Hong G Kong. In the absence of such an arrangement, there must be a special direction by the Minister. Sections 3 and 3A of the Ordinance provides as follows:

> 3(1) Where an arrangement has been made between the Federation and any foreign country for the surrender of fugitive criminals, the Yang DiPertuan Agong may by Order published in the Gazette declare that this Ordinance H shall apply in the case of such foreign country:
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> Provided that no Order shall be made under this subsection unless the arrangement is in conformity with the provisions of this Ordinance, and in particular with the restrictions on the surrender of fugitive criminals contained in section 5 thereof.
>
> (2) The Yang DiPertuan Agong may by the same or any subsequent Order I published in the Gazette limit the application of the Order or render the application thereof subject to such conditions, exceptions and qualifications as he may think fit.
>
> (3) No such Order shall remain in force for any longer period than the arrangement referred to in subsection (1) of this period.

3A Where a foreign country in respect of which no Order has been made under subsection (1) of section 3, or in respect of which such an Order has been made but is not in force, makes a request for the extradition thereto of a fugitive criminal of that country, the Minister may personally, if he deems it fit to do so, give a special direction in writing that the provisions of this Act be applied in relation to the extradition thereto of that particular fugitive criminal as if there is in force in respect of that foreign country an Order under subsection (1) of section 3.

It was contended by the applicant that Hong Kong is not a foreign country within the meaning of the Ordinance and there is no arrangement between Malaysia and Hong Kong under the Ordinance. As such no requisition could be made by Hong Kong under the Ordinance. In a matter where the liberty of a subject is affected, viz the detention of a person, the party who had initiated the detention must satisfy the court that the detention is done lawfully. In the present case, not only did the respondents failed to satisfy the court that the detention under the Ordinance was lawfully done, they did not raise the issue whether the detention under the Ordinance was lawful or not. As such I believe the respondents conceded that the detention of the applicant under the Ordinance was not lawfully done. Since the detention was unlawful, it was contended by the applicant that his present detention under the Act is a continuation of an unlawful detention and as such the present detention is also unlawful.

It is clear from the authorities that it is for the arresting authority to show to the court that a detained person has been detained lawfully. Thus in the case of *Re Tan Sri Raja Khalid bin Raja Harun*,[1] the Supreme Court held that when a person who has been deprived of his liberty challenges the detention, it is for the authority to show that the person has been detained in exercise of a valid legal power. Once that is shown, the burden shifts to the detainee to show that the power had been exercised mala fide or improperly or made for a collateral or ulterior purpose.

Even assuming that the detention under the Ordinance was lawful it was contended by the applicant that there was a period when the detention under the Ordinance and the requisition under the Act overlapped. It is common ground that on 1 July 1992, the second respondent issued a new requisition under the Act. The applicant by then was still under detention as a result of a requisition by the second respondent under the Ordinance. The new requisition under the Act was purportedly to replace the requisition under the Ordinance. This actually happened when the second respondent withdrew all proceedings under the old requisition (requisition under the Ordinance) on 4 August 1992. The requisition under the Act are for the same offences as the requisition under the Ordinance. In essence, both requisitions are the same. It is not wrong for me to come to the conclusion that the requisition under the Act is to replace the requisition under the Ordinance and to re-start the whole machinery to extradite the applicant to Hong Kong.

As a result of the requisition under the Act, the Minister on 30 July 1992 issued a special direction under s 3 of the Act. On 31 July 1992, the Minister issued an order to the magistrate for the apprehension of the applicant. On the same date, the magistrate issued a warrant of apprehension

against the applicant. The warrant of apprehension was executed on 4 August 1992 when the applicant was released after the second respondent had discontinued proceedings against him under the Ordinance. The applicant was re-arrested immediately after his release.

From the facts, it is clear to me that as on 31 July 1992, all the respondents knew that they were not proceeding on with the requisition under the Ordinance. All preparations for the proceedings under the Act had been completed by then but the respondents did nothing to release the applicant from detention. In my view, the applicant should by then be informed that all proceedings against him under the Ordinance had been discontinued. The respondents chose not to do so but waited until 4 August 1992 when the applicant appeared for the purposes of the enquiry under the Ordinance to discontinue all proceedings under the Ordinance and to proceed under the Act. I could not help but agree with the contention of the applicant that the purpose of the respondents for doing was to keep the applicant in detention until all preparations had been completed under the Act.

It is clear to me that the complaint of the applicant in respect of his detention under the Ordinance is well founded. In view of what I have stated above, I found that the detention of the applicant under the Ordinance was unlawful because it was done without any legal basis. Even assuming that the detention was lawful, at the very least his detention from 31 July to 4 August 1992 was unlawful on the ground that by 31 July 1992, all the respondents knew that the requisition dated 10 June 1992 had lapsed and there was no basis for them to continue to act under that requisition albeit the detention of the applicant until 4 August 1992.

What is the effect of a detention which is a continuation of an unlawful detention? The position is made clear by the case of *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor*[2] where Edgar Joseph Jr J (as he then was) held:

> (2) The applicant's period of detention in police custody at the Muar police station from 14 December 1986, until sometime in the morning of 16 December 1986 when he was removed to the rehabilitation centre was wholly unauthorized and therefore in violation of art 5(1) [of the Federal Constitution] as being otherwise than in accordance with [the] law;
>
> (3) the detention order will not operate to salvage the case for the detaining authority for it specifically provided for detention at the centre for two years from 12 December 1986 and cannot therefore have the effect of rendering legal the applicant's illegal detention at the Muar police station from 14 December 1986 until his removal therefrom on the morning of 16 December 1986;
>
> (4) *the detention of the applicant under s 4(1)* [of the Emergency (Public Order and Prevention of Crime) Ordinance 1969] *was not procured by steps all of which were entirely regular nor was the court satisfied that 'every step in the process' which led to such detention was followed with extreme regularity and therefore the court should not allow the imprisonment to continue. To hold to the contrary would in effect mean that the Minister had power to continue detention of one who is being illegally detained.* ...(Emphasis added.)

It is clear from the above case that the detention of a person as a result of an irregular detention will render the detention of that person as unlawful even though steps had been taken to remedy the defects. It is also clear to me that in that case, though it was shown to the court that the detention order for two years effective from 12 December 1986 which include the days when the detainee was held unlawful, the whole detention order was held to be bad in law and the detention was unlawful. This decision was confirmed by the Supreme Court.

In my view, the case which is directly in point to the present application is the case of the *State (Trimbole) v The Governor of Mountjoy*.[3] The facts of that case were that at 2pm on 25 October 1984, one Robert Trimbole was arrested purportedly pursuance to s 30 of the offences against the State Act 1939. Early the next afternoon the detention period was extended by another 24 hours. At about the same time the Government made an order applying Pt II of the Extradition Act 1965 in relation to the Commonwealth of Australia as and from that date. The same afternoon the prosecutor applied to the High Court to have the legality of his detention ascertained, which hearing was fixed for 7pm that evening. At 6pm, a provisional warrant pursuant to s 27 of the Extradition Act 1965, was issued by district justice Ballagh. At the High Court hearing, Egan J found that as genuine suspicion that the said Trimbole had committed a firearms offence could have been formed by the arresting Garda; that the arrest and detention were illegal and accordingly ordered Trimbole released. A short while later, at approximately 10pm outside the precincts of the Four Courts, the said Trimbole was arrested on foot of the provisional warrant just issued by district justice Ballagh. He was then brought to the district court and remanded in custody.

On 2 November 1984, a habeas corpus application challenging the remand orders was refused by Egan J. On 8 November 1984, the Minister for Justice addressed an order to district justice Kotsonouris pursuant to s 26 of the Extradition Act 1965, signifying that he had received from the Commonwealth of Australia a request for the extradition of Trimbole. Application was then made on 17 November 1984 to Kotsonouris for orders committing the said Trimbole to prison, there to await the orders for his extradition or until the High Court or Supreme Court should order his release. On 4 November 1984, the said Trimbole applied to the High Court pursuant to art 40 of the Constitution for an enquiry as to the legality of his detention.

At the High Court, it was held by Egan J that the object of the arrest, pursuant to s 30 of the Offences Against the State Act 1939, of the said Trimbole was to ensure that he would be available for the provisional warrant arrest, that such arrest amounted to a deliberate and conscious violation of constitutional rights; that there were no extraordinary excusing circumstances; that his detention in subsequent proceedings was tainted by the illegality of his original arrest and accordingly the prosecutor (Robert Trimbole) was to be immediately released. On appeal to the Supreme Court, the judgment of Egan J was upheld and the appeal was dismissed.

The Supreme Court held that the courts have not only an inherent jurisdiction but a positive duty: (a) to protect persons against the invasion of their constitutional rights; (b) if invasion had occurred, to restore as far as possible the person so damaged to the position in which he would have been if his rights had not been invaded; and (c) to ensure as far as possible that persons acting on behalf of the executive who consciously and deliberately violate the constitutional rights of citizens do not for themselves or their superiors obtain the planned results of that invasion.

The respondents in the present case on the other hand contended that the detention under the Ordinance had no effect on the detention under the Act. The two detentions must be treated separately. To support this contention, counsel for the second respondent cited the case of *Jagannath Misa & Ors v State of Orissa*.[4] In that case, the accused petitioners were remanded under s 344 of the Criminal Procedure Code to jail custody from 8 March to 17 April 1969 by a magistrate who had no jurisdiction to try their case and were ultimately produced by the police before the magistrate having jurisdiction to try the case to be dealt with under s 344 of the Criminal Procedure Code and were again remanded to jail custody by that magistrate on 17 April 1969. It was held that the orders of remand passed by the magistrate who had no jurisdiction to try the case were illegal and therefore the detention of the accused from 8 March to 17 April 1969 was illegal. The illegal detention could not affect the powers of the magistrate having jurisdiction to take action under s 344 of the Criminal Procedure Code and as such, the detention of the accused subsequent to 17 April 1969 was perfectly legal.

The respondents also cited the case of *Godavari v State of Maharastra*.[5] In that case, the detenu had been arrested under the Preventive Detention Act by an order of the police commissioner. The order was sent to the State Government for approval. The State Government revoked the order of the police commissioner under the Preventive Detention Act and on the same date passed an order under r 30 of the Defence of India Rules. The latter order was served on the detenu in jail. The legality of the order was challenged on the ground that it was served while the detenu was in jail. It was held that the order was legal. The order passed by the State Government under the Defence of India Rules when it had decided to revoke the earlier order of the police commissioner was perfectly valid so far as the time of the making of the order was concerned and its service in jail on the detenu who was detained not as under trials or as convicted person could not be assailed. That case could easily be distinguished from the present case because the challenge was on the service of the second order while he was in jail and furthermore in that case, there is nothing to show that the detention under the first order was illegal.

It is clear to me that the principle stated in that case is not applicable to Malaysia in view of the case of *Koh Yoke Koon v Minister for Home Affairs*.[2] Though the two Indian cases had not been cited in the case of *Koh Yoke Koon v Minister for Home Affairs*,[2] it is clear to me that the position in Malaysia is that if a detention of a person is a result of an earlier unlawful detention, then the second detention is unlawful.

In my view, the facts in the present case is similar to the case of *State (Trimbole) v Governor of Mountjoy*.[3] The principle in that case is also similar to the case of *Koh Yoke Koon v Minister of Home Affairs*.[2] It is clear to me that the detention of the applicant under the Ordinance or at the very least for the period from 31 July 1992 to 4 August 1992 was unlawful. As such, the detention under the Act is unlawful because in effect it is a continuation of the unlawful detention. I believe that is sufficient for me to allow the present application.

The applicant also raised the point that the detention under the Act is unlawful because it is done not in accordance with the law. It is common ground that the applicant was detained as a result of a requisition by the Hong Kong Government under the Extradition Act 1992. On 1 July 1992, the Governor of Hong Kong made a requisition for extraditing the applicant to Hong Kong for certain offences under the Extradition Act 1992. This requisition was conveyed by one Stuart Ian Wall, the Third Secretary (Consular) of the British High Commission to the first respondent on 23 July 1992. As a result of that requisition, the first respondent issued a special direction under s 3 of the Extradition Act 1992 dated 30 July 1992. On 31 July 1992, the Minister issued an order to the magistrate under s 12 of the Act for the apprehension of the applicant. On 1 August 1992, the magistrate issued a warrant of apprehension against the applicant. On 4 August 1992, the applicant was re-arrested after he was released by the magistrate when the second respondent withdrew the proceedings under the Ordinance.

It was contended by the applicant that the requisition by the second respondent and the special direction by the Minister were not lawful. As such, the arrest and the detention of the applicant pursuant to the requisition and the direction was a nullity.

Section 1 of the Act provides:

> ...
> (2) This Act or any part thereof shall apply to—
>
> (a) such countries in respect of which the Minister has issued an order under section 2;
> (b) such countries in respect of which the Minister has issued a special direction under section 3.

It is clear to me that this Act shall apply on country to country basis. A country is defined by s 38 of the Act as follows:

> For the purposes of this Act, every constituent part of a country and every colony, dependency and protectorate of, and every vessel or aircraft of, that country shall be deemed to be within the jurisdiction of and to be part of such country.

From the above it is clear and it was conceded by the respondents that the colony of Hong Kong by itself is not a country within the meaning of the Act. It is a colony of the United Kingdom. As such if Hong Kong needs to do anything under the Act it could do so only through the United Kingdom. I believe all the parties in the present application agreed to this.

In view of the above, it was contended by the applicant that the requisition dated 1 July 1992 was a requisition by Hong Kong and not by the United Kingdom. As such the requisition was not by a country as required by the Act. Since the requisition is not in accordance with the law it was contended by the applicant that the consequential actions are not valid. Thus the requisition dated 1 July 1992 is of utmost important. For this purpose it is pertinent for me to cite the relevant provisions of the law. Section 2(1) of the Act provides:

> Where a binding arrangement has been entered into between *Malaysia and any country* for the extradition of fugitive criminals, the Minister may, by order to be published in the Gazette reciting or embodying the terms of such agreement, direct that the provisions of this Act shall apply to that country subject to any restriction, exception, modification, adaptation, condition or qualification contained in the order. (Emphasis added.)

When there is no such arrangement, s 3 provides:

> Where *a country in respect of which no order has been made under section 2* makes a request for the extradition thereto of a fugitive criminal, the Minister may personally, if he deems it fit to do so, give a special direction in writing that the provisions of this Act shall apply to that country in relation to the extradition thereto of that particular fugitive criminal. (Emphasis added.)

It is clear from the above that the request must be made by a country.

It was submitted by the respondents that though the requisition dated 1 July 1992 was signed by the Governor of Hong Kong, in actual fact the request was made by the United Kingdom Government and not by the colony of Hong Kong. This is evidence by the letter dated 23 July 1992 from Mr Stuart Ian Wall, the Third Secretary of the British High Commission to the Minister. On the other hand, the applicant submitted that the letter is not a request but a mere letter forwarding the requisition by the Governor of Hong Kong. It is for me to decide whether that letter is a formal request in accordance with the Act or otherwise.

The Act requires that any request shall be made by a country through its diplomatic representative. Section 12(1) of the Act provides:

> A requisition by any country for the return of a fugitive criminal who is in or suspected of being in Malaysia shall be made to the Minister by a diplomatic representative of that country.

Diplomatic representative means the chief representative or the consular officer of the British High Commission. There is a letter dated 20 October 1992 from Kementerian Luar Negeri to say that the writer of the letter dated 23 July 1992, Stuart Ian Wall, is the Third Secretary (Consular). The word Consular in both letters were in brackets. I do not know the significance of those brackets. The applicant submitted that the writer is not a 'consular officer' of the British High Commission. I believe once this is challenged, the onus is on the respondents to satisfy the court that he is a 'consular officer' within the meaning of the Diplomatic and Consular Privileges Ordinance 1957. Section 2(1) of the Ordinance defines 'consular officer' to be:

> ... a consul-general, consul, vice-consul *or consular agent representing a foreign sovereign power to whom an exequatur or provisional or other authorisation to perform consular functions has been granted by the Government of the Federation and includes an officer of any Commonwealth country who is for the time being recognised by the Government of the Federation as an officer of that country performing in the Federation functions substantially corresponding to those which in the case of a foreign power would be performed by a consular officer.* (Emphasis added.)

It appears that a mere letter stating that he is a consular is not sufficient. The respondents also provided a list of names of officers in the high commissions and embassies to show that Mr Ian Stuart Wall was the Third Secretary in the British High Commission. As could be seen in s 2(1), a person is said to be a consular officer when there is a letter of authorization from the Government of Malaysia for that officer to perform consular functions. No such authorization letter was produced and as such there is no evidence to show that the writer of the letter dated 23 July 1992 is a consular officer to enable him to make a request on behalf of the United Kingdom. As such if the letter is to be treated as a request it is not a valid request under the Act.

Assuming that he is a consular officer as provided by the Act, one will have to see the letter itself to decide whether it was a request made by a country. It is clear to me that s 12(1) requires that the request be made by a diplomatic representative on behalf of the country he is representing. On reading the letter dated 23 July 1992, it appears to me that Mr Ian Stuart Wall made the request himself and not on behalf of the United Kingdom. Nowhere in that letter was it mentioned that the request was made by the United Kingdom or that he made the request on behalf of the United Kingdom. The letter did not mention the United Kingdom making a request for the extradition for the applicant for offences committed in the United Kingdom or any of its territory. In my view, in a matter which is as serious as this certain formalities must be followed to show at the very least the name of the requesting state. It must be remembered that this is a formal request on country to country basis. A good example of formal request could be seen from the affidavit of the first respondent, viz exh THC12 which is the request made by Hong Kong Government. It must also be remembered that the liberty of a subject is affected and must be done in strict compliance with the law. In my view the letter dated 23 July 1992 written by Mr Wall is nothing more than a letter forwarding the request by the Hong Kong Government and the contents of the letter appears to confirm this. The letter itself states clearly that all undertakings were given by the Hong Kong Government and not by the United Kingdom Government.

After considering the various documents tendered during the hearing, I am of the view the letter is not a request as required by s 3 of the Extradition Act 1992. Without that request there is only the requisition dated 1 July 1992 by the colony of Hong Kong. Since Hong Kong is not a country within the meaning of the Extradition Act 1992 that requisition should not be acted upon.

A It appears that from the various documents which had been exhibited the first respondent had taken the same view as I did, that the request was by the Hong Kong Government through the requisition dated 1 July 1992 and not by the United Kingdom through the letter by Mr Wall. The special direction under s 3 of the Act issued by the first respondent treated the request as being from the colony of Hong Kong and not from the United B Kingdom. The special direction is exhibited as exh THC11 in the affidavit of the applicant. It is stated in the special direction as follows:

> *Whereas the crown colony of Hong Kong has made a request for the extradition thereto of Tan Hock Chan alias Tan Hock Lai* Identity Card No 3638906, a Malaysian citizen, accused of the commission ...
>
> C *Now therefore, in the exercise of the powers conferred upon me by virtue of s 3 of the Extradition Act 1992, I, Mahathir bin Mohamad, the Minister of Home Affairs, Malaysia, do hereby direct that the provisions of the said Act be applied in relation to the extradition of that particular fugitive criminal, namely, Tan Hock Chan alias Tan Hock Lai, as there is in force in respect of the crown colony of Hong Kong an order made under s 2 of the said Act.* ... (Emphasis added.)

D From the above it is clear to me that the first respondent at all material times and for all intents and purposes considered that the request for the extradition of the applicant was by the colony of Hong Kong. Nowhere was it mentioned the United Kingdom.

E Even the first respondent treated the letter by Mr Wall as a mere forwarding letter and not a request because the direction and subsequent orders did not mention any request made by Mr Wall either for himself or on behalf of the United Kingdom. As I have stated earlier, a colony or a protectorate cannot by itself make a request to Malaysia. That being the case, I rule that there is no request by the United Kingdom. Since there is F no request all subsequent actions including the apprehension and the detention of the applicant are not lawful.

Even assuming that the request is in order it is my view that the special direction given by the Minister under s 3 (THC11) is a nullity on two grounds:

G (1) The special direction is not valid because it was issued on an invalid request by the colony of Hong Kong and thus not in accordance with the Act. The Minister acted on a request not by a country as required by the Extradition Act 1992. When the Minister made the direction, it is clear from the wordings of the direction that he was under the wrong H impression that the request was made by Hong Kong. As such the direction itself is a nullity because under the Act the Minister has no power to act on a request by Hong Kong.

(2) Secondly, the Minister made the direction 'Now therefore, in the exercise of the powers conferred upon me by virtue of s 3 of the I Extradition Act 1992, I, Mahathir bin Mohamad, the Minister of Home Affairs, Malaysia, do hereby direct that the provisions of the said Act be applied in relation to the extradition of that particular fugitive criminal, namely, Tan Hock Chan alias Tan Hock Lai, as there is in

respect of the crown colony of Hong Kong an order made under s 2 of the said Act', it is clear to me that the Minister was making a direction not permitted by the law. Under s 3 of the Act the Minister is only permitted to make a direction in respect of a country when there is a proper request by that country.

As such in my view the special direction by the Minister (THC11) is not valid. The order of the Minister to the magistrate (THC12) issued under s 12 of the Act is also not valid because it was issued as the sequence of the special direction. The warrant of apprehension dated 1 August 1992 (THC10) is not valid because it was issued as a result of the order of the Minister which is invalid. The detention of the applicant based on the warrant of apprehension is unlawful.

For the above reasons I hold that the detention of the applicant to be unlawful. As such he is entitled to the writ of habeas corpus and he is to be released immediately. His passport is to be returned to him.

Order accordingly.

Reported by Jeanne Tan